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Supreme Court of the United States

No. 301—October Term, 1961

AMERICAN CHICLE COMPANY,

Appellant,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION

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Comes now the appellee above named and moves under Rule 16(1)(b) of the Rules of this Court to dismiss the appeal taken to this Court by Notice of Appeal dated July 10, 1961 from the final order (erroneously referred to as a judgment) of the Court of Appeals of the State of New York on the ground that it does not present substantial Federal questions or, in the alternative, to affirm the final order so appealed from.

The Nature of the Proceeding and Determinations Made Below

This proceeding was instituted in the Supreme Court of the State of New York, Albany County, under Article 78 of the New York Civil Practice Act, to review a final determination of the State Tax Commission, which had sustained assessments of corporate franchise taxes imposed by Article 9-A of the New York Tax Law for the privilege

years 1950-1954, inclusive. The proceeding was transferred to the Appellate Division, Third Judicial Department, of the Supreme Court, for initial disposition pursuant to Section 1296 of the Civil Practice Act, where such determination was unanimously confirmed with an opinion reported in 11 A. D. 2d 256 (Appen. C of Applt's Juris. Stmt.). Among other things, this opinion stated:

> "We find no violations here of the Due Process and Equal Protection clauses of the State or Federal Constitutions."

On appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed without opinion, with two Judges dissenting. 9 N. Y. 2d 883. Upon appellant's motion to amend the remittitur, that Court's remittitur was amended to recite (9 N. Y. 2d 965):

> "* * * Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.:* Appellant contended that the construction by the New York State Tax Commission of section 210 of the Tax Law denied it the equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment. The Court of Appeals held that there was no such violation, and that there was no substance or merit to appellant's contentions."

Statement of the Case

While the facts are undisputed, it is nevertheless necessary to make a factual recitation thereof by reason of misleading factual and legal inferences drawn from appellant's incomplete Statement of Facts.

The American Chicle Company, incorporated under the Laws of New Jersey in 1899, has been doing business in the State of New York since that date and maintains its manu-

facturing plant and its principal office in Long Island City, New York, with only a statutory office in New Jersey (R. pp. 17, 191). It is engaged in the manufacture and sale of chewing gum and similar confectionery products (R. p. 51).

During the privilege years in question, 1950-1954, inclusive, the American Chicle Company had entered into storage and distribution "rental arrangements" with independently owned and operated public warehouses located at Jacksonville, Fla., Camden, N. J., and Cleveland, Ohio, whereby its products were temporarily stored pending ultimate distribution to various customers (R. pp. 45-46). While these contracts were not introduced in evidence, it appears from the record that the amount of products and storage space varied with each of these public warehouses, depending upon factors of supply and demand for appellant's products (R. pp. 52-54). Under the respective storage arrangements, the American Chicle Company paid each public warehouse a rental charge based upon the volume of cartons stored and handled (R. pp. 48, 67) and a certain amount per order for the necessary clerical work involved and for repackaging where necessary (R. pp. 48-49). Warehouse rental charges were increased from time to time by reason of increased operating costs incurred by the warehouse, mostly labor costs (R. pp. 49-50).

In some instances deliveries of appellant's products were made directly from these public warehouses to certain "clear credit accounts" which pertained solely to large chain stores. But this was done only after their credit had been previously approved at the home office in New York and then only where the "orders still clear through the New York office" (R. pp. 54, 71-73). All other orders for the sale of appellant's products were accepted and

received at its principal office in New York before any distribution was made from any of the three public warehouses (R. pp. 66-67). After receipt and acceptance of a sales order by the home office, the respective public warehouse involved was notified by the appellant as to that order, and shipping instructions issued as to assembling and labeling the goods for delivery to the customer. The warehouse then prepared bills af lading and requested the proper carrier to pick up for delivery (R. p. 52). Some jobbers might go directly to the warehouse for pickup as the result of an undisclosed arrangement with appellant's home office (R. pp. 66-67). Appellant furnished the warehouse with blank forms to use—certain bills of lading forms, inventory forms and copies of invoices (R. p. 54).

Each public warehouse is maintained and operated as a separate and independent legal and economic entity furnishing storage facilities to all who wish to utilize them. Each assigns and pays its *own employees* to handle appellant's merchandise (R. pp. 51, 65-66, 87), and appellant has no actual control over their working activities (R. pp. 65-66; *cf.* p. 80). Despite the bald assertion that appellant's control was exercised, the record discloses that this was nothing more than the usual "separate sheet of instructions for each warehouse" for storage purposes and for the handling of orders at the warehouse (R. pp. 53-54, 81). This seems to deal with sealing and packaging of cartons (R. p. 82), and the freight routes to be used (R. pp. 53, 81, 83, 84). Presumably, this was in accordance with the warehouse storage contracts since representatives from appellant's home office occasionally visited the warehouses to see if this was carried out (R. pp. 82, 87). If any doubt or confusion arose, it would be resolved at appellant's home office by telephone (R. p. 83). Occasional visits also

were made by appellant's sales managers two or three times a year but this seems to be only as the result of customers' complaints (R. pp. 57, 67, 71).

While appellant asserted that it preferred to enter into storage contracts with these three public warehouses in Florida, New Jersey and Ohio, being influenced by cost and transportation factors (R. pp. 58, 60-62, 70, 85), nevertheless, it does own and operate its own warehouses in other States which are maintained by its own employees (R. pp. 64-65). As to distribution from its own warehouses, the record shows that all sales orders are received and accepted at offices maintained by the appellant *outside* New York State—not at its principal office in New York. All such receipts from sales out of its own warehouses, of course, are allocated outside this State and are excluded from the statutory sales receipts factor of the formula (N. Y. Tax Law § 210[3][a][2][B]. These allocations are reflected in the business income allocation percentages used in apportioning appellant's business income within and out the State of New York which is fully set forth in appellee's final determination (R. pp. 5-8). No question is raised (R. pp. 17-24) as to either the adequacy or accuracy of the factual findings or mathematical computations set forth in such determination (R. pp. 4-14).

Questions the Appeal Would Present

Whether a foreign corporation, having only a statutory office in New Jersey, engaged in a manufacturing business in New York State with its principal place of business located in New York, is deprived of equal protection of the laws and of due process of law under the Fourteenth Amendment to the Constitution of the United States where New York denies an out-of-state allocation of receipts from

sales of goods from out-of-state independent public warehouses upon orders received and accepted in New York under a corporate franchise tax formula, designed to allocate to New York a fair share of net income, where by reason of the sales receipts factor of such formula, the State construes sales from such public warehouses as not having been made from a statutory "permanent or continuous place of business maintained by the taxpayer without the state * * *".

No questions concerning any burden upon interstate commerce are before the Court, in view of the limited scope of the federal questions in the remittitur (9 N. Y. 2d 965). None was raised in appellant's petition for judicial review (R. pp. 17-24).

There is no constitutional violation where receipts from sales from orders received and accepted at the principal office in New York are allocated to that State.

We submit that both Courts below correctly found appellant's constitutional contentions were devoid of merit. Appellant has not sustained its burden of overcoming these tax assessments upon any constitutional ground (see *e. g., Norton Co.* v. *Department of Revenue of Illinois,* 340 U. S. 537). There has been no showing that any "extra territorial values have been taxed" (see *e. g., Butler Brothers* v. *McGolgan,* 315 U. S. 501, 507; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183) nor, despite the intimation to the contrary, "There is nothing to show that multiple taxation is present. We cannot deal in abstractions." (*Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 463.) There is nothing in this Record showing, in the face of such a broad intimation, either the precise nature of the kinds of taxes paid by appellant in the states where distribution

was made from public warehouses, or even whether the sales, approved in New York for such distribution, had any connection whatever and/or to what extent were they factors at all considered by foreign taxation, in any event. Consequently, all such inferences are purely speculative and have no relevancy to appellant's contentions asserted here (*Northwestern States Portland Cement Co.* v. *Minnesota, supra*).

The crux of this proceeding centers upon questions of statutory construction of broad statutory terms (N. Y. Tax Law § 210) implemented by appropriate administrative franchise tax regulations (Arts. 411, 412, 413), and the application of both to appellant's various business transactions, within and without New York State. Appellant's position stems from a misunderstanding of the taxing concepts involved in New York's franchise tax formula—one which contains three factors, property, sales receipts and payrolls and the percentage weight given to each, designed to allocate to New York a fair share of corporate net income from business conducted in New York by a foreign domesticated corporation. Such misunderstanding, we submit, gives rise to appellant's erroneous construction of the statute and regulations and by its failure to give due weight to each term thereof. This is emphasized by its argument as though nothing at all significant occurred at its main office in New York for the approval and acceptance there of all sales of its products ultimately distributed from out-of-state, independent, public warehouses owned and operated by others as separate legal and economic entities. Under this Court's decisions, of course, receipt and acceptance of such sales orders are *taxable* events, constituting a sufficient nexus upon which to apportion sales income to the taxing state in the percentage computations under the

formula. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450; *Scripto, Inc.* v. *Carson*, 362 U. S. 207; *Butler Bros.* v. *McGolgan*, 315 U. S. 501.

In full recognition of such taxable nexus, and of business done in New York, the sales receipts factor of the formula provides (Tax Law § 210[3][a][B]):

> "(B) sales of any such property not located at the time of the receipt of or appropriation to the orders at any *permanent or continuous* place of business *maintained* by the taxpayer without the state, where the orders were received or accepted within the state and for purposes of this clause an order shall be deemed received or accepted within the state if it has been received or accepted by an employee, agent, agency or independent contractor chiefly situated at, connected with, by contract or otherwise, or sent out from a permanent or continuous place of business of the taxpayer within the state." (Emphasis added.)

This has been a part of the statute since L. 1944, ch. 415, as amended by L. 1948, ch. 603, and is in substitution of the former "accounts receivable" factor, the constitutionality of which had been sustained long ago in *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271. The substitution was made to more equitably allocate income (Pub. Papers of Gov. Dewey [1943], p. 500), and expresses the "origin of sales" concept rather than "sales destination" erroneously asserted by appellant.

The decisive phraseology is italicized above which, as broad statutory terms, were appropriately defined by administrative regulations as excluding independent public warehouses from their scope for the very logical reason that such places of business, for sales receipts purposes, were not those of the taxpayer; otherwise, there would be no need, as here, to transmit to its home office for approval sales orders which the statute is designed to reach.

Thus, the regulations, giving full meaning to each statutory term, provide (Art. 413[2]):

> "Art. 413 (2). Sales of Tangible Personal Property Not Located at a Permanent Place of Business Outside New York. Receipts from sales of the taxpayer's tangible personal property (such as goods, wares, merchandise, etc.) are allocable to New York if such property is not located, at the time of the receipt of or appropriation to the orders (Art. 413 [1]), at any permanent or continuous place of business maintained by the taxpayer outside New York, provided the orders are either received or accepted in New York. Under this provision, if the property sold was not in existence or was located outside New York at the time the order was received, and was located outside New York at the time it was appropriated to the order, the receipt from the sale is nevertheless allocable to New York, unless it can be shown also (1) that at one of those times the property was located at a permanent or continuous place of business maintained by the taxpayer outside New York, or (2) that the order was both received and accepted outside New York. (As to property located in New York at the time of receipt of or appropriation to the order, see Art. 413 [1]). An order is deemed received or accepted in New York if received or accepted by an employee, agent, agency or independent contractor chiefly situated at, connected with, by contract or otherwise, or sent out from a permanent or continuous place of business of the taxpayer within New York.
>
> A permanent or continuous place of business maintained by the taxpayer outside New York in any *bona fide* office (other than a statutory office), factory, warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance.
>
> Tangible personal property purchased by the taxpayer and held by the seller for delivery as directed by the taxpayer, property in transit, property stored

in a public warehouse, property in the possession of an independent contractor, and property in the possession of an independent factor for sale at his own discretion are not located at a permanent or continuous place of business maintained by the taxpayer. (Compare, regular place of business, Art. 411.)"

All of Article 413 emphasizes the statutory intent to exclude public warehouses from statutory places of business "permanently or continuously maintained" outside New York so as to afford an allocation under the sales receipts factor where orders are received and accepted in New York. Thus, in addition to what is strictly its text, illustrative examples are appended to the regulations (Art. 413[2]):

"*Example 3:* A taxpayer receives or accepts in New York an order which it fills from a stock of goods in a warehouse regularly maintained by it through its own employees in Michigan. The receipt from the sale is not allocable to New York.

Example 4: A taxpayer receives or accepts in New York an order for a machine. If, after receipt of the order, the taxpayer purchases the machine and has it shipped direct to its customer by the seller, the receipt from the sale is allocable to New York; but if the taxpayer manufactures the machine in its factory outside New York, from which it is shipped to the customer, the receipt from the sale is not allocable to New York.

Example 5: A taxpayer receives or accepts in New York an order of a customer under which goods can be withdrawn, from time to time, from a stock of goods kept by the taxpayer in a public warehouse outside New York. When goods are withdrawn to fill the order, the taxpayer is notified and it bills the customer. The receipt from the sale is allocable to New York.

Example 6: A taxpayer accepts an order through a salesman or officer working out of its New York office in another state, and fills such order from a stock of goods kept in a public warehouse outside New York. The receipt from the sales is allocable to New York.

Example 7: A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor, who manufactured the shirts for it and who ships the shirts to the customer. The receipt from the sale is allocable to New York.

Example 8: A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor who manufactured the shirts for it. The taxpayer has an arrangement with the contractor under which space at the contractor's plant is leased to the taxpayer for the storage of the shirts manufactured for it and facilities are made available for the shipment of the shirts to the customer from the plant of such contractor by a shipping clerk employed by the taxpayer. The receipt from the sale is allocable to New York."

We submit that this administrative interpretation gives rise to no questions of constitutionality here on any score.

The fallacy of appellant's position is that it fails to distinguish between the two kinds of warehouse distributions, public and private, which it utilizes in different states. Each presents valid taxable distinctions which, by its own business decisions, appellant otherwise recognizes by its election, as the record clearly shows (R. pp. 65, 69), to distribute its products from its *own* warehouses regularly and systematically maintained and operated, permanently and continuously, in its own name, in other states where orders are received and accepted in those states. Allocation is given, of course, to such sales.

The two methods of distribution cannot be equated, however, because they do not stand upon the same tax footing. Taxwise, rational distinctions do exist between mere distributions from independent public warehouses, where all sales are approved in New York, with right of rejection,

too, on the one hand, and distributions from its own warehouses which it permanently and continuously maintains, on the other hand. The former cannot be considered either appellant's sales offices or places of business for sales receipts. Actually this record throws little light on just what sales activities are involved in those states, in any event. They certainly are not the same as in those states where it maintains its own warehouses. Furthermore, there has been no showing whatever that appellant has gone into those "public warehouse" states to do its own localized business, as distinguished from the independent business of the public warehouses which are legal and economic entities of their own doing their own business, as it has become localized in those states where it does maintain its own branch offices and its own business warehouses (see *Norton Co.* v. *Department of Revenue*, 340 U. S. 537). For ought we know from this record, appellant's resort to public warehouse activities may be precisely to avoid subjecting itself to localized jurisdiction in such states with all the myriad legal consequences flowing therefrom and in order to retain all the benefits otherwise accorded by its domestication in New York—consequences affecting its corporate jurisdictional status, business, employees, and liability, to mention only a few resulting from doing its own business in its own name with its own employees. Certainly, appellant's relationship to the states where those public warehouses are located is not direct nor the same as it is to New York or to those other states where it does do its own business in its own warehouses. That kind of relationship involves, of course, opportunities which those states give, protection afforded and benefits conferred requiring the right of taxation in return (see *Wisconsin* v. *Penny Co.*, 311 U. S. 435, 444).

Appellant has not shown what factors or reasons why an allocation should be obtained and has not overcome the basic reason for granting a sales allocation outside New York, in the first place, *viz.*, doing its own business elsewhere.

For these reasons there is no merit to appellant's attempted comparison of its taxable position with that of its competitors, speculative in any event, who maintain their own warehouses outside the State and who receive from New York a sales receipts allocation for doing their own business in such a way. There the jurisdictional nexus for such business is elsewhere, not New York, which warrants allocation there for other and different reasons and which deprives New York of its allocation even though orders may be approved in New York. Similarly, there is no merit for appellant's bald assertion that New York has "dictated" appellant's business decision by taxation. This is idle sophistry, since New York has done no such thing any more than it has with respect to appellant's election to use its *own* warehouses elsewhere for which full allocation is obtained.

We submit by reason of the different kinds of business transactions involved between the two methods of distribution and the legal consequences thereof that rational distinctions exist which not only constitutionally justifies, but warrants a taxable classification between public warehouses and appellant's own warehouses for sales receipts purposes. This has been done by regulations pursuant to and in accordance with the statute, both of which recognize business sales receipts such as appellant's, as separate and apart from the storage business of public warehousemen. Therefore, they are not so disparate, relative to the classification, as to be wholly arbitrary—consequently, such

classification neither denies equal protection of the laws nor due process. See *e.g.*, *Walters* v. *City of St. Louis*, 347 U. S. 231, 237; *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522. As to the former, appellant is treated precisely the same as all other corporations, foreign or domestic, similarly situated, and, as to the latter, there has been no arbitrary discrimination whatever. We also submit that none of appellant's citations relied upon as tending to show its constitutional deprivation are applicable here. They are all clearly irrelevant, factually and legally, to the circumstances present here and do not support appellant's contentions that substantial Federal questions are involved in this proceeding. The case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, for example, has been long since isolated by reason of its peculiar circumstances, as its opinion makes quite clear. For one thing, that case, involving only one factor, is authority only for the ruling that income attributable to the taxing state was out of all appropriate proportion to the business done there, which is certainly not the case here. Secondly, as to the circumstances here, that case has been disposed of by *Butler Bros.* v. *McColgan*, 315 U. S. 501, 507.

In conclusion, we point, so far as the property factor is concerned under the formula (N. Y. Tax Law § 210[3][a][1]), appellant's property located at public warehouses is and has been excluded therefrom by appellee's regulations (Art. 411). This is not disputed, of course, by the appellant. This exclusion is in full recognition of the foreign situs of property located at such places outside the State and beyond its jurisdiction. Thus the statute provides (Tax Law § 210[3][a][1]):

> "ascertaining the percentage which the average value of the taxpayer's real and tangible personal property within the state during the period covered by its re-

port bears to the average value of all the taxpayer's real and tangible personal property wherever situated during such period."

Pursuant thereto, the regulations treat out-of-state public warehouses as "regular" places of business for property factor purposes and not as "permanent or continuous" places of business "maintained" by a taxpayer, as follows (Art. 411):

"Art. 411. Computation of Business Allocation Percentage. If the taxpayer did not have a regular place of business outside New York during the period covered by the report, its business allocation percentage is 100%; in other words, the taxpayer may not allocate any of its business income or capital outside New York.

A regular place of business is any *bona fide* office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer. (Compare, *permanent or continuous place of business*, Art. 413[2].)

A taxpayer does not have a regular place of business outside the state solely by consigning goods to an independent factor outside the state for sale at the consignee's discretion.

If the taxpayer had a regular place of business outside New York during the period covered by the re-

port, its business allocation percentage is generally computed on the basis of its

(1) real and tangible personal property (including real property rented to it) within and without New York (Art. 412, 412[1]),

(2) business receipts within and without New York (Art. 413), and

(3) payrolls within and without New York (Art. 414).

The business allocation percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, business receipts and payrolls within New York during the period covered by the report, and dividing the total of such percentages by three. However, if one of the factors (property, receipts or payrolls) is missing, the other two percentages are added and the sum is divided by two, and if two of the factors are missing, the remaining percentage is the business allocation percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator *and* its denominator are zero.)

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the business allocation percentage may be computed by adding the percentages derived from the allocation of its receipts and payrolls, and dividing the total by two.

If it appears that the business allocation percentage computed on the basis of all or any of the property-receipts-payroll factors does not properly reflect the activity, business, capital or income of the taxpayer in New York, the State Tax Commission may adjust the business allocation percentage, as set forth in Art. 415."

Here again rational distinctions exist for this particular differentiation.

CONCLUSION

The motion to dismiss the appeal should be granted, or, in the alternative, the order appealed from should be affirmed.

Dated: September 5, 1961.

Respectfully submitted,

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